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Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

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The government's position is that civilian seamen, employed by the government on *merchant* vessels, are properly entitled to sue for damages under the Suits in Admiralty Act; but civilian seamen employed by the government on *public* vessels, should be deprived of a like right, notwithstanding the provisions of the Public Vessels Act. In support of that contention, the government's brief urges that (a) the Federal Employees' Compensation Act applies to its public vessel mariners, but has never applied to its merchant vessel mariners, and (b) legislative developments indicate that Congress did not recognize that civilians employed by the government, had a right to elect between compensation and a suit for damages. We will demonstrate that both of these assumptions are without validity.

I

In 34 Op. A. G. 12[illegible] (1924), the Attorney General ruled that civilian seamen, injured on *merchant* vessels operated by the government through the U. S. Shipping Board Emergency Fleet Corporation, were employees of the government, entitled to benefits under the Federal Employees' Compensation Act. The opinion at least impliedly recog-

nized their right to elect either compensation or to seek damages, for it made reference to congressional debate, wherein the need for eliminating any possibility of double recovery, was recognized. That congressional debate was concerned with an act of 1919, involving an appropriation under the Compensation Act. The same opinion went on to hold that those seamen, who were employed by private companies which operated vessels under Agency Agreements for the government, were not government employees, and were therefore not entitled to the benefits of the Compensation Act as government employees. This part of the opinion was soon overruled by the opinion to which we shall now make reference.

Under 34 Op. A. G. 363 (January 17, 1925), Attorney General Stone ruled that civilian seamen, injured on *merchant* vessels owned by the government, although operated by private companies under Agency Agreements, were also employees of the government, and that they were therefore similarly entitled to the benefits of the Compensation Act, unless they had already been otherwise paid benefits for such injury. (The opinion pointed out that additional factual data submitted subsequent to the prior ruling, indicated that these men were not really employees of the private companies, as held in the prior opinion.)

Further, when Congress adopted the Clarification Act in 1943, it expressly recognized that notwithstanding the provisions of the Suits in Admiralty Act, under which government employed civilian seamen could sue for damages, they were also entitled to an alternative right to seek benefits under the U. S. Employees' Compensation Act. The Clarification Act applied only to merchant seamen employed by the government through the War Shipping Administration and its successors in interest. It was feared that these seamen might, because of this Act, be held to have a double right of recovery. Accordingly, Congress inserted therein a provision reading as follows:

> "Such seamen * * * shall not be considered as officers or employees of the United States for the purposes of

the United States Employees' Compensation Act" (50 War App. Section 1291, Ch. 26, 57 Stat. 45, H. R. 133).

If the merchant seamen affected by this legislation were not entitled to compensation, that provision would have been unnecessary. Senate report 62, from the Committee on Commerce, which accompanied the Clarification Act (H. R. 133), stated as follows at page 5:

> "Present day operating conditions often make uncertain in some cases whether the vessel is a merchant or a public vessel. * * * In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the U. S. Employees' Compensation Act in the event of injury or death."
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> * * * * * * *
>
> (p. 12) "The effect of this legislation is to eliminate the danger that seamen may recover both against the Federal Employees' Compensation fund and under his statutory or common-law remedies for the same injury."

House report number 107 of the Committee of Merchant Marine and Fisheries, February 8th, 1943; also supporting H. R. 133, stated at page 13:

> "It has become trite to say that this is a war of transportation, since ocean transportation is a limiting factor which will determine the amount of supplies or number of troops that can be transported to the many theatres of active combat. * * * The Administrator also performs very important functions in the conduct of the economic phases of the war effort * * *."
>
> * * * * * * *
>
> (p. 22) "It has also been the fixed policy of the War Shipping Administration as far as possible to treat claims for injury, illness, death, and so forth, relating to seamen who are employed aboard vessels that might be classified technically as public vessels, in the same manner as such claims relating to seamen who are employed aboard merchant vessels are treated."

Annexed to the report on H. R. 133, there also is a letter from the U. S. Employees' Compensation Commission dated July 31st, 1942, stating:

> "It appears from information received by the Commission that the employment arrangement, with respect to seamen engaged upon vessels operated by or for the War Shipping Administration is such as to give seamen upon such vessels status as civil employees of the United States. As such, they or their dependents would be entitled to receive the full protection entitled to workmen under the Federal Employees' Compensation Act * * *."

Senate report 1655 (quoting from House report 2572 in connection with this bill) states as follows, at Page 21:

> "These men have faced hardships, capture, injury and death in the forefront of the battle with the enemy. Their courage has been high and their spirits unflagging. Many of these men who have had their vessels torpedoed from under them have reached shore only to return to the conflict again. At sea they must constantly be on the alert and face danger and even death every hour of the day and night. No words can be too strong to express the value of their services to the nation in this war."

It is therefore quite clear that neither Congress, nor the administrative agencies above adverted to, and who were involved in this legislation, were of the opinion that there were any basic distinctions between civilian seamen employed on merchant vessels of the United States, as compared with civilian seamen employed on board public vessels of the United States. It is also quite clear that they envisaged no difficulties in connection with personal injury suits for damages by such seamen.

If there were any question as to whether government employed civilians had the right to elect, that question was completely removed by enactment of an amendment to the Compensation Act, on July 1st, 1944. On that

date, the Public Health Service Act was adopted. The pertinent provision is Title VII, Ch. 373, Section 605, (58 Stat. 712, Public Law 410, H. R. 4624, adopted 78th Congress, Second Session). That section provides:

> Sec. 605. (a) Section 7 of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended (U. S. C., 1940 edition, title 5, sec. 757), is amended by changing the period at the end thereof to a colon and adding the following: "*Provided*, that whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and when made shall be irrevocable unless otherwise provided by law."

By this amendment which was in effect at the time petitioner herein sustained his injury, Congress inserted express language into the Compensation Act, which merely carried out the interpretation which the Courts had previously given to that Act ever since the *Dahn* v. *Davis* decision. That this was merely a restatement of recognized existing law, appears clear from the remarks on the floor of the Senate, when this bill was adopted. Senator Thomas, introducing the bill, stated:

> "The bill was given careful consideration by both the House committee and the Senate committee. It was carefully studied. It does not add to the law of the land, nor does it take away from the law of the land. * * *"

Senator George made a similar statement, as follows:

> "I looked into the bill, made some examination of it, and gave it some scrutiny to see whether it was a mere codification or clarification, and was intended to be that only, without adding any new laws. I reached the conclusion that it was, just as the Senator from Utah has stated" (90 Cong. Rec. Part 5 (78th Cong., 2nd Session), page 6486).

In addition, House report 1364, of the Committee on Interstate and Foreign Commerce, which accompanied the bill, stated at page 1:

> "It proposes to bring together, in a compact and orderly arrangement, substantially all existing law on the subject except obsolete provisions; to repeal obsolete laws; to resolve certain ambiguities in existing law; and to make a number of revisions which operating experience has shown to be necessary or desirable."

At page 30 of the report, reference is made to section 605, which amends the very sections of the U. S. Employees' Compensation Act involved herein, by inserting an express provision calling for an election, the report stating:

> "Subsection (a) amends section 7 of the Compensation Act so as to require an election between benefits under this act and any other benefits payable by the United States by reason of the same death or injury, if the benefits are based on services as a Federal Employee."

In *Parr* v. *U. S.*, 172 F. 2d 462 (C. A. 10th, 1949), a shoreside civilian employee of the War Department filed suit under the Federal Tort Claims Act, alleging injuries sustained by the negligence of other government employees. The government claimed that the Fedral Employees' Compensation Act was his exclusive remedy. In repudiating that contention, and in holding that such a government employee had a right of election, the Court stated at pp. 463-464:

(2) "When the Federal Tort Claims Act became effective, appellant had two remedies, each for the same wrong, and both against the United States. One was under the Employees' Compensation Act, and the other was under the Tort Claims Act. He then had the option to select either remedy and follow it through."

To the same effect, see also, *Canon* v. *U. S.*, 188 F. 2d 444 (C. A. 9th, 1951). Both of those cases arose prior to the 1949 amendment to the Compensation Act.

The arguments made by the government, as to alleged distinctions regarding applicability of the Compensation Act, or the right to elect to sue for damages, are completely undermined by the foregoing, as well as by the authorities cited in the Petitioner's original brief.

II

In *Thomason, et al.* v. *U. S.*, 184 F. 2d 105 (C. A. 9th, 1950), seamen employed on Army tugboats, filed suit for wages under the Tucker Act. The government successfully contended that such suit should be filed under the Public Vessels Act. In its opinion, the Court stated at pp. 107-108:

"As we read the decisions dealing with the Public Vessels Act, there seems to have been an increasing recognition of the greater breadth of its scope as different jurisdictional questions have been presented. It was at first thought to apply almost exclusively to collision cases. See, O'Neal v. United States, D. C. E. D. N. Y., 1925, 11 F. 2d 869; Dobson v. United States, 2 Cir., 1928, 27 F. 2d 807. This theory has been discarded and we find jurisdiction to have been upheld in a case involving property damage caused by the negligent operation of a public vessel by its crew. Canadian Aviator, Ltd. v. United States, 1945, 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901. In this case it was said that 'the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as if

imposed by the admiralty law on the private shipowner * * *.' 324 U. S. 228, 65 S. Ct. 646. In the case of American Stevedores, Inc. v. Porello, 1947, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011, recovery was awarded to a stevedore who had been injured while working aboard a public vessel in port by the fall of a beam which, through the negligence of the United States, had not been securely locked in place. The case of United States v. Loyola, 9 Cir., 1947, 161 F. 2d 126, held the Public Vessels Act sufficiently broad to cover an action for maintenance and cure by a seaman who had contracted tuberculosis during a voyage on a public vessel. See also, Mandel v. United States, D. C. E. D. Pa., 1947, 74 F. Supp. 754. Finally, the Act has been held to cover wage claims similar to those asserted in the instant case. Jentry v. United States, D. C. S. D. Cal., 1947, 73 F. Supp. 899.

The sustaining of jurisdiction under the Public Vessels Act in other than collision cases is in accord with the evident purpose of Congress to provide for the adjudication of seaman controversies in the admiralty courts. Pursuant to that purpose, Congress has passed two complementary jurisdictional statutes, the Suits in Admiralty Act for cases where the public vessel involved is employed as a merchant vessel, and the Public Vessels Act where the vessel is employed exclusively as a public vessel. It is a rational interpretation to say that in providing a forum for the adjudication of maritime claims uniformity was sought.

* * * * * * *

If the Tucker Act were held to be available to seamen on public vessels, they would enjoy a six-year statute of limitations, while seamen on United States merchant vessels would be restricted to a two-year limitation. Each case would require a determination of whether or not the ship at the time was 'operated as a merchant vessel', a distinction both difficult of proof and insignificant to the merits of the seaman's claim. Such an arbitrary departure from uniformity was not intended."

The government apparently realizes that its arguments (based on the history, statutes and interpretations of those

statutes involved herein) are unsound. It therefore attempts to bring itself within the ruling of the *Feres* case, in order to justify a dismissal of the suit. The government thus concedes that a civilian seaman, employed by the government on a public vessel, has the right to bring a suit for damages under the Public Vessels Act, but contends that such a suit must, nevertheless, be dismissed, on the ground that it would not constitute a cause of action on the merits, as a matter of law. We think that it misreads the *Feres* opinion.

In *Feres* v. *U. S.*, 340 U. S. 137, 71 Sup. Ct. 153 (1950) this Court held that the Federal Tort Claims Act gave the Court jurisdiction to entertain a suit by a soldier, injured in the line of duty, but that the provisions of that particular Act were such that there could be no right of recovery in that case on the merits. The reason was that the Federal Tort Claims Act provided that the government was to be liable in the same manner and to the same extent "as a private individual under like circumstances", and in accordance with "the law of the place where the act or omission occurred." The opinion pointed out that no private individual had the right to conscript an army, that no local substantive law could apply to a soldier injured while on duty, and that Federal law also recognized no right of recovery such as the injured soldier sought. It was therefore held that there was no reason to conclude that Congress intended to create a new cause of action dependent upon local law, so as to award damages for injuries sustained by military personnel in the line of duty.

On the other hand, here we have a situation in which the Public Vessels Act, like the Suits in Admiralty Act, governs the rights of the petitioner, so as to give him a cause of action against the government under federal law, to recover damages for personal injuries resulting from negligence or unseaworthiness.

CONCLUSION

The government has sought to make comparison between the benefits which would be received under the Compensation Act, as compared with other modes of relief. We feel that adequacy or inadequacy of the benefits to be derived from any Compensation Act, as compared with the benefits to be derived in a suit for damages would seem to be a matter for the consideration of Congress, rather than for the Courts. Suffice it to say that every Compensation Act introduced for the purpose of eliminating the right of seamen to sue for damages, has been uniformly opposed by labor, and defeated in Congress. If the government wishes to eliminate the right of election which these seamen have, it must address itself to Congress.

The right of election which has been recognized since the decision in the *Dahn* v. *Davis* case, and which was expressly placed into the Compensation Act by the amendment of 1944, and the legislative history affecting the rights of seamen, require that the decision of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

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